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No. 92-1948

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM V. WALKER, TRUSTEE, MINRO OIL INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to consider petitioner's appeal from the order of the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unreported. The orders of the district court (Pet. App. 5-8) are unreported. The opinion of the bankruptcy court is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1992. The petition for rehearing was denied on February 3, 1993 (Pet. App. 9). The petition for a writ of certiorari was filed on May 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the trustee for Minro Oil, Inc., a debtor in federal bankruptcy proceedings. Petitioner filed a complaint against the United States in the bankruptcy court seeking a refund of corporate income taxes that had been prepaid by Minro (Pet. App. 1-2). The bankruptcy court found that Minro was liable for $593,574.65 in unpaid taxes and penalties. The court ordered that liability to be set off against the prepaid taxes to be refunded (Pet. App. 2). Petitioner appealed the bankruptcy court's judgment to the district court.

2. On March 11, 1991, the district court entered an order affirming the judgment of the bankruptcy court (Pet. App. 2). Petitioner did not file a notice of appeal from the district court's order within the 60-day time period prescribed by Federal Rule of Appellate Procedure 4(a)(1). On December 6, 1991—which was 271 days after the issuance of the district court's order—petitioner filed a motion in the district court requesting the court to vacate and reenter its order so that petitioner could then file a timely notice of appeal from the new order (Pet. App. 2).

On January 10, 1992, the district court issued an order granting petitioner's motion (Pet. App. 7-8). The court found that petitioner was entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure because (i) a copy of the March 11, 1991, order had been been mailed to the wrong address and petitioner had not received notice of the order prior to the expiration of the period for filing a notice of appeal and (ii) petitioner's counsel had made efforts to ascertain the status of the case (Pet. App. 7-8). Petitioner then appealed to the court of appeals.

3. The court of appeals dismissed the appeal as untimely. The court of appeals observed that Rule 4(a)(6) of the Federal Rules of Appellate Procedure (which became effective on December 1, 1991, and therefore applies to this case) provides that a district court may reopen the time for appeal for a party who fails to receive notice of an order if the party files a motion seeking such relief within 180 days of the entry of the order (Pet. App. 2-3). Because petitioner's motion to vacate was filed after the 180-day period prescribed by Rule 4(a)(6), the court of appeals held that the district court abused its discretion by granting the requested relief (Pet. App. 3-4).

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to review petitioner's untimely appeal from the district court order affirming the judgment of the bankruptcy court. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides (emphasis added):

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, *upon motion filed within 180 days of entry of the judgment or order* or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days, from the date of entry of the order reopening the time for appeal.

As explained in the Advisory Committee Note, Rule 4(a)(6) "establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal." Rule 4(a)(6), like other Federal Rules of Appellate Procedure, governs appeals from district courts to courts of appeals in bankruptcy cases. Fed. R. App. P. 1(a); Bankruptcy Rule 8001, Advisory Committee Note.

The court of appeals correctly held in this case that the district court abused its discretion by vacating and reentering its prior order. It is undisputed that petitioner filed his motion to vacate the order 271 days after the order was entered. Petitioner's motion was thus filed well after the 180-day period established by Rule 4(a)(6) had expired. Because petitioner failed to file a timely notice of appeal from the district court's original order, and failed to file a timely motion to vacate that order in the district court, the court of appeals correctly dismissed the appeal for lack of jurisdiction.

2. Petitioner's contention (Pet. 8-10, 14-15) that the decision of the court of appeals impermissibly restricts the scope of Rule 60(b) of the Federal Rules of Civil Procedure overlooks the fact that Rule 60(b) was not applicable to the district court proceedings in this case. See *Conn Aire, Inc.* v. *J.C. Leasing*, 91 B.R. 462 (M.D. Tenn. 1988). The Federal Rules of Civil Procedure "do not apply to proceedings in bankruptcy * * * except in so far as they may be made applicable thereto by rules promulgated by [the] Supreme Court of the United States." Fed. R. Civ. P. 81(a)(1). "Appeals to district courts in bankruptcy cases are governed by Part VIII of the Bankruptcy

Rules. Bankr. R. 8001-8019." *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir. 1987). These rules do not contain any provision akin to Federal Rule of Civil Procedure 60(b). *Conn Aire, Inc.* v. *J.C. Leasing*, *supra*.[1] Accordingly, the court of appeals' decision in this case has no impact on the proper scope of Rule 60(b).

3. The decision of the court of appeals does not conflict with *Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 113 S. Ct. 1489 (1993), and *Useden* v. *Acker*, 947 F.2d 1563 (11th Cir. 1991), cert. denied, No. 91-1944 (June 7, 1993) as petitioner contends (Pet. 10-12). In *Pioneer Investment Services*, this Court resolved a conflict in the courts of appeals over the meaning of the term "excusable neglect" in Bankruptcy Rule 9006(b)(1). The Court's interpretation of Rule 9006(b)(1) in *Pioneer Investment Services*, however, has no bearing on the question presented in this case, which concerns whether a district court sitting as an appellate court in bankruptcy may vacate and reenter an order to allow a party to file a timely notice of appeal pursuant to a motion filed after the expiration of the 180-day time period prescribed by Federal Rule of Appellate Procedure 4(a)(6).

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[1] Rule 9024 of the Bankruptcy Rules makes Federal Rule of Civil Procedure 60(b) applicable to bankruptcy courts. Bankruptcy Rule 9024, however, does not apply to a district court that is sitting as an appellate court in bankruptcy. A district court acting in that capacity may entertain a motion for rehearing, but only if the motion is filed within 10 days of the entry of judgment. Bankr. R. 8015. Petitioner's motion to vacate in this case was filed long after the expiration of this 10-day period.

In *Useden* v. *Acker*, the court of appeals held that a district court that was *not* sitting as an appellate court in bankruptcy could vacate and reenter a prior order under Rule 60(b) to allow a party to file a timely notice of appeal when counsel acted diligently and in reliance upon statements of the trial court.[2] 947 F.2d at 1570-1571 (citing *Harnish* v. *Manatee County*, 783 F.2d 1535, 1538 (11th Cir. 1986)). As discussed above, however, Rule 60(b) was not applicable in the district court in this case because the district court was sitting as an appellate court in bankruptcy.[3]

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[2] *Useden* did not involve a situation where a party failed to receive notice of a district court order prior to the expiration of the time for filing a notice of appeal. The problem in that case was that the litigant had been induced by the conduct of the trial court to forgo filing a timely notice of appeal. 947 F.2d at 1571. In *Harnish* v. *Manatee County*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986), the court of appeals held that a district court that was not sitting as an appellate court in bankruptcy could in appropriate circumstances vacate an order under Rule 60(b) to allow a party who had failed to receive notice of the order to file a timely notice of appeal. *Harnish* was decided prior to the adoption of Federal Rule of Appellate Procedure 4(a)(6).

[3] Prior to the adoption of Federal Rule of Appellate Procedure 4(a)(6), courts of appeals had taken divergent approaches as to the availability of Rule 60(b) relief to parties who failed to receive notice of a district court order or judgment before the expiration of the time for filing a notice of appeal. See *Wilson* v. *Atwood Group*, 725 F.2d 255, 257-258 (5th Cir.) (en banc), cert. dismissed, 468 U.S. 1222 (1984). No court, however, has addressed the relationship between Rule 60(b) and Federal Rule of Appellate Procedure 4(a)(6). Petitioner acknowledges as much in describing this case as a "case of first impression" (Pet. 8). As discussed in the text, the court of appeals also did not address that issue in this case

4. Petitioner's contention (Pet. 12-14) that the United States was obligated to file a cross-appeal in order to raise the jurisdictional issue in the court of appeals is without merit. A party need not file a cross-appeal in order to bring jurisdictional defects to the attention of an appellate court. See, *e.g.*, *Bullard* v. *Sercon Corp.*, 846 F.2d 463, 467-468 (7th Cir. 1988); *National Wildlife Federation* v. *Agricultural Stabilization & Conservation Service*, 955 F.2d 1199, 1202-1203 (8th Cir. 1992); *Big Country Foods, Inc.* v. *Board of Education of Anchorage School District*, 952 F.2d 1173, 1176 (9th Cir. 1992). As this Court has emphasized, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986) (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)). Accord, *Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975).[4]

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because Rule 60(b) relief was not available to the petitioner in the district court.

[4] Petitioner's reliance (Pet. 13-14) on *Alaska Industrial Board* v. *Chugach Electric Ass'n*, 356 U.S. 320 (1958), is misplaced. In that case, the respondent had argued unsuccessfully in the court of appeals that the Alaska Industrial Board lacked jurisdiction under state law to award the petitioner continuing benefits for temporary total disability, but had ultimately prevailed on the merits. This Court reversed the decision of the court of appeals and held that it would not consider the state law jurisdictional issue because respondent had not filed a cross-petition for certiorari. *Id.* at 324-325. That case thus addresses the need to cross-petition in this Court to raise issues not raised in the petition; it does not suggest that an appellee

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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must file a cross appeal to challenge the jurisdiction of a federal appellate court.